Supreme Court, U. S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-313

ELLIS GORDON,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Of Counsel:
FINE & AMBROGNE,
133 Federal Street,
Boston, Massachusetts 02110.
(617) 482-0100

HARRIS, SHELTON, DUNLAP
& COBB,
One Commerce Square,
Suite 1300,
Memphis, Tennessee 38103.
(901) 525-1455

ROBERT F. SYLVIA,
133 Federal Street,
Boston, Massachusetts 02110.
(617) 482-0100

ROBERT L. CAPORALE,
133 Federal Street,
Boston, Massachusetts 02110.
(617) 482-0100

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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UNITED STATES OF AMERICA,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Now comes the petitioner and respectfully petitions this Court for a writ of certiorari to issue to the United States Court of Appeals for the Sixth Circuit.

In support of this request, your petitioner says as follows:

Opinions Below.

A copy of the opinion of the Court of Appeals for the Sixth Circuit filed July 27, 1979, in the case of *United States* v. *Jer-*

ome Sandy and American International Picture Exchange of Washington, D.C. (*77-5367*), *Ellis Gordon* (*77-5368*), *Marvin Zide and Allied Film Exchange, Inc.* (*77-5369*), *John O. Glaus* (*77-5370*), *and Marvin Friedlander and Marvin Films* (*77-5371*), is annexed hereto as Exhibit A. A copy of the judgment of the Court of Appeals for the Sixth Circuit filed July 27, 1979, in those same cases is annexed hereto as Exhibit B. The Clerk's Office of the Court of Appeals for the Sixth Circuit has advised the petitioner that the opinion annexed hereto as Exhibit A will be published, but this has not yet occurred. Accordingly, no citation is currently available. The opinion of the District Court in this case is annexed hereto as Exhibit C. This opinion is unreported and thus no citation is available.

Jurisdiction.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1) in that by judgment dated July 27, 1979 (Exhibit B annexed hereto), which was entered in court on that same date, the United States Court of Appeals for the Sixth Circuit affirmed the conviction of the petitioner and others of conspiracy to distribute an obscene film in interstate commerce in violation of 18 U.S.C. §§ 371 and 1462 (1976). The petitioner, being aggrieved thereby, has a right to request a writ of certiorari under 28 U.S.C. § 1254(1).

Questions Presented.

The petitioner respectfully suggests that the following questions are presented for review:

1. In an obscenity case which is tried without a jury, under pre-trial rulings which improperly denied the defendant the benefits of the *Roth-Memoirs* test which was the law at the time of the allegedly unlawful conduct, can the trial judge cure that error by a post-trial ruling designed to conform to *Marks* v. *United States*, 430 U.S. 188 (1977)?

2. Is there proper venue for a conspiracy prosecution in the Western District of Tennessee when there is no allegation in the indictment or proof at trial that the agreement was made there, and when it is found at trial that no conspirator has committed any overt act in that district?

3. In the trial of an indictment alleging nationwide conspiracy to distribute an obscene motion picture film, may the District Court refuse to admit evidence of the standards of the community from which and to which an alleged conspirator, who is a defendant, is alleged to have distributed the obscene motion picture?

4. May the District Court in that case apply only the standards of the district of trial, to conduct of a defendant who has engaged in no activities in the district?

Statutory Provisions Involved.

The case involves the following statutory provisions which are set out hereafter:

United States Code, Title 18.

§ 371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United

States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 1462. *Importation or transportation of obscene matters.*

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce —

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful —

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

Statement of the Case.

1. Summary of Proceedings Below.

By indictment dated February 15, 1973, filed in the United States District Court for the Western District of Tennessee, the United States accused, inter alia, the petitioner, Ellis Gordon, of conspiring to ship an obscene film known as "Schoolgirl" in interstate commerce. The District Court had jurisdiction of the offenses specified in said indictment under 18 U.S.C. § 3231. Certain defendants other than the petitioner were also accused in the indictment of specific violations of 18 U.S.C. § 1462 involving the shipment of a print of "Schoolgirl" into the State of Tennessee from other states. Prior to trial, and after the District Court ruled on various pre-trial motions, certain of the defendants, including the petitioner, waived their right to a jury trial and elected to proceed by what has since been termed colloquially as a "truncated trial."

The so-called truncated trial involved a stipulation as to the anticipated testimony of one Saul Schiffrin and various stipulations as to the activities of each of the defendants who elected the truncated trial. These stipulations were placed in evidence and certain additional evidence was taken during

two days of trial held on January 5 and 6, 1976. Subsequently, those defendants who did not elect the truncated trial, including the defendants Tom Berman, Louis K. Scher, Arnold Jordan, Gordon Craddock, Craddock Films, Inc., Art Theatre Guild, Inc., and Sherpix, Inc., who were accused, with the petitioner, of conspiracy in count I of the indictment, were tried before a jury. On February 20, 1976, the jury returned verdicts of "not guilty" against all defendants who elected a jury trial on the conspiracy count, count I, and returned verdicts of "guilty" against those defendants charged with the specific criminal acts identified in counts II through VI of the indictment.

By decision dated July 28, 1977, the petitioner and all of the remaining defendants who elected the truncated trial, with the exception of the defendants Richard L. Miller, Lou Wolff and Harry Brandt Booking Office, Inc., were convicted of conspiracy pursuant to count I of the indictment. The petitioner claimed an appeal to the United States Court of Appeals for the Sixth Circuit which on July 27, 1979, affirmed the conviction of petitioner. This petition for a writ of certiorari was then filed.

2. Statement of Facts.

The petitioner, Ellis Gordon, is an individual who during all times material to the indictment operated a film distribution business as a sole proprietor, which business was located in Boston, Massachusetts. Gordon is classified as a subdistributor in that he customarily received a film for distribution from a national distributor and then distributed the film to exhibitors in his distribution area.

Sherpix, Inc. (hereafter Sherpix), is a national distributor of motion picture films. Sherpix purchased all of the rights to a

motion picture entitled "Schoolgirl" from the producers of that film in August, 1971. Sherpix then undertook to make arrangements for the national distribution of that film. Sherpix had an existing arrangement with Gordon whereby Gordon distributed films for it in the Boston distribution area. Gordon received "Schoolgirl" pursuant to that general distribution arrangement which had been in effect since 1968.

The distribution arrangements with the petitioner and the other subdistributor defendants were essentially the same. Sherpix retained the sole responsibility for approving, prior to final consummation, any exhibition of "Schoolgirl" in any theater. Each of the subdistributors had an exclusive distribution right for "Schoolgirl" within their recognized distribution areas subject to the right of Sherpix to distribute the film directly to the first theater which agreed to distribute "Schoolgirl" in the distribution area and subject further to the right of Sherpix to handle distribution agreements directly with theaters operated by Art Theatre Guild, Inc., which corporation was the parent of Sherpix. The role of the subdistributors in the distribution of "Schoolgirl" was thus to obtain bookings for the film to be exhibited in theaters within their distribution area and to submit those bookings to Sherpix for approval. If approval was granted, arrangements were made to ship the film either directly from Sherpix, or through subdistributors, to the ultimate exhibitor. The subdistributors were compensated for their efforts in connection with the film "Schoolgirl" by receiving a percentage of the amount received by Sherpix from bookings made by each of them.

Gordon was not directly or indirectly involved in any shipment of a print of "Schoolgirl" into or out of the State of Tennessee. As a result of distribution arrangements made by Sherpix with persons other than Gordon, the film was shipped into Tennessee and the instant indictment was obtained from the grand jury.

Reasons for Granting the Writ.

The petitioner feels that the writ of certiorari should be granted for the following reasons:

1. THE DISTRICT COURT'S RETROACTIVE APPLICATION OF THE TEST FOR OBSCENITY WHICH WAS THE LAW AT THE TIME OF THE ALLEGEDLY UNLAWFUL CONDUCT DOES NOT CURE THE ERROR ARISING FROM THE COURT'S EARLIER RULINGS WHICH REQUIRED PETITIONER TO PREPARE FOR AND PROCEED TO TRIAL UNDER THE WRONG TEST FOR OBSCENITY.

At the time of the nonjury trial the District Court judge informed the parties in a series of pre-trial rulings that his determination of the issue of obscenity was to be governed by the standard set forth in *Miller* v. *California*, 413 U.S. 15 (1973). He made this determination even though the acts charged constituted pre-*Miller* conduct because of the Sixth Circuit's decision in the case of *United States* v. *Marks*, 520 F. 2d 913 (6th Cir. 1975). This Court ultimately decided that defendants indicted for pre-*Miller* conduct were entitled to the benefits of the *Miller* test and were also entitled to the application of the pre-existing *Roth-Memoirs* test,* *Marks* v. *United States*, 430 U.S. 188, 196-197 (1977). The Court of Appeals concedes that prejudice could arise as a result of a mid-stream change in the rules, but concludes that none has arisen in this particular case (Pet. App. 6a). The petitioner respectfully suggests that prejudice has been established in the following areas:

(a) When a determination was made by the petitioner to waive his right to a jury trial, he was faced with two possibil-

* *Roth* v. *United States*, 354 U.S. 476, 484-485 (1957); *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966).

ities: a jury trial under the *Miller* standards and a nonjury trial under the *Miller* standards. Had the trial judge's pre-trial rulings been correct, he would have been faced with an entirely different choice, that being a jury which was to be instructed, not only under the *Miller* standards, but also under the *Roth-Memoirs* standards. This Court has alluded to the advantages to a defendant of the *Roth-Memoirs* test (*Miller*, 413 U.S. at 22), but this petitioner was denied the opportunity to consider that advantage, thereby depriving him of his free choice to make a knowing and voluntary waiver of jury trial. Waiver cannot exist where the choice given is not real, and amounts to a choice "between the rock and the whirlpool." *Garrity* v. *New Jersey*, 385 U.S. 493, 398 (1967).

Second, the petitioner was denied the right to present a defense. Where a court ruling has the effective result of denying this right, there has been a denial of due process of law. *Webb* v. *Texas*, 409 U.S. 95, 98 (1972) (per curiam). By virtue of the court's pre-trial ruling, it excluded from consideration evidence which would have been admissible under the *Roth-Memoirs* test, but which would be wholly inadmissible under *Miller*.

The petitioner has thus been deprived of at least two fundamental rights by virtue of the trial court's admittedly erroneous pre-trial ruling. The Court of Appeals, in violation of its own precedent, has applied a "harmless error" test to these fundamental rights. (See *United States* v. *Goodwin*, 531 F. 2d 347, 352 (6th Cir. 1976).) The petitioner should be granted a new trial wherein he will have an opportunity to present his case before a jury, which will be instructed under the proper legal standard.

2. Venue in the Western District of Tennessee is Improper Since Neither the Agreement Nor Any Overt Act Committed by a Conspirator Occurred in the District of Trial.

The theory of the prosecution in this case is not that an agreement was reached in the Western District of Tennessee, but rather that certain conspirators committed overt acts there. If that were the case, venue would be proper under *Hyde* v. *United States*, 225 U.S. 347, 359-360 (1912). The indictment alleges an agreement which was not made in Tennessee and that overt acts were committed in the Western District of Tennessee by Sherpix, Inc., Art Theatre Guild, Inc., Gordon Craddock, Craddock Films, Inc., and others. The District Court then found that Sherpix, Inc., Art Theatre Guild, Inc., Gordon Craddock and Craddock Films, Inc., had committed overt acts within the Western District of Tennessee (Pet. App. 29a-30a). These, then, are the venue-giving defendants, and all of them were ultimately acquitted by a jury of this conspiracy.

Conspiracy law, unlike the law in many other areas, contains a principle of consistency in verdicts. See generally *Developments in the Law — Criminal Conspiracy*, 72 Harv. L. Rev. 920, 972-974 (1959). The rule in the Sixth Circuit on this point is clear. When there has been an acquittal of other members of an alleged conspiracy, the indictment must be read as if those acquittals were incorporated therein. *United States* v. *Lester*, 363 F. 2d 68, 72 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967). The indictment in this case must thus be read as if Sherpix, Inc., Art Theatre Guild, Inc., Gordon Craddock and Craddock Films, Inc., were not members of the conspiracy. So read, the trial judge's findings of fact do not support venue in the Western District of Tennessee because no

person found to have committed an overt act in that district is a member of the conspiracy.

The Court of Appeals endeavors to cure this difficulty by contending that one Saul Schiffrin, an unindicted co-conspirator, arranged for the transportation of the film into Memphis (Pet. App. 12a), but this ignores the fact that, although the indictment alleges that Schiffrin performed such an overt act, the trial judge did not find that he did. The Court of Appeals also contends that the acquittal of the venue-giving defendants of conspiracy does not mean that they did not commit overt acts in the district, since they were convicted of various violations of the obscenity laws as substantive offenses (Pet. App. 12a). The problem with this reasoning is that it ignores the fact that for purposes of this indictment these individuals are not members of the conspiracy. Thus, the commission of overt acts by these defendants in the Western District of Tennessee is immaterial. Since they were not conspirators, their overt acts do not create venue.

Simply stated, the jury acquittal of the venue-giving defendants requires a reversal of the petitioner's conviction because there was no venue for the trial of this conspiracy, if it existed at all, in the Western District of Tennessee.

3. The District Court's Refusal to Consider Evidence of Standards of Relevant Communities Outside of the Western District of Tennessee was Erroneous.

Gordon's distribution area was Massachusetts, Connecticut, Vermont and Maine. Prior to trial he sought permission to introduce evidence as to the standards of these communities, but the District Court ruled that such evidence would not be admitted, and that only the standards of the Western District of Tennessee would be applicable. This ruling was reaffirmed shortly before trial.

The prosecution in this case alleges a "national conspiracy." One of the significant aspects of *Miller* is its conclusion that there is no single nationwide standard by which to judge whether a particular item is obscene. This Court has said that "a district court would . . . be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide." *Hamling* v. *United States*, 418 U.S. 87, 106 (1974). In this case the District Court clearly should have admitted such evidence in the case of Gordon. Since distributors from all parts of the country were caught in the web of this alleged nationwide conspiracy, the limitation of evidence to the standards of the Western District of Tennessee makes the standards of that district a nationwide standard of the type prohibited by *Miller*. While it may be perfectly appropriate to exclude standards of other districts when a defendant is charged with a substantive offense of shipping obscene material into a judicial district in violation of 18 U.S.C. § 1462, on the theory that the defendant is properly chargeable with knowledge of the standards of the district into which he ships the materials, it is wholly inappropriate in a nationwide conspiracy case, particularly as to those defendants who had no dealings with the Western District of Tennessee, such as Gordon. As to them, the standards of the Western District of Tennessee become a prohibited national standard, in that persons involved in the nationwide distribution of any film will have no choice but to treat the most restrictive standards present in the United States as the standards governing their conduct with regard to that film. *Miller* expressly sought to avoid this "lowest common denominator" approach, but by refusing to admit evidence of this type, the District Court has imposed just such a prohibited nationwide standard.

Conclusion.

Based on the foregoing, your petitioner respectfully requests that a writ of certiorari issue.

Respectfully submitted,

Of Counsel:
FINE & AMBROGNE,
133 Federal Street,
Boston, Massachusetts 02110.
(617) 482-0100

HARRIS, SHELTON,
DUNLAP & COBB,
One Commerce Square,
Suite 1300,
Memphis, Tennessee 38103.
(901) 525-1455

ROBERT F. SYLVIA,
133 Federal Street,
Boston, Massachusetts 02110.
(617) 482-0100

ROBERT L. CAPORALE,
133 Federal Street,
Boston, Massachusetts 02110.
(617) 482-0100

Exhibit A.

Nos. 77-5367-8-9-70-71

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEROME SANDY and AMERICAN INTERNATIONAL PICTURES EXCHANGE OF WASHINGTON, D.C. (77-5367),

ELLIS GORDON (77-5368),

MARVIN ZIDE and ALLIED FILM EXCHANGE, INC., (77-5369),

JOHN O. GLAUS (77-5370) and
MARVIN FRIEDLANDER AND MARVIN FILMS (77-5371),
Defendants-Appellants.

APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed July 27, 1979.

Before: ENGEL and KEITH, Circuit Judges and PECK, Senior Circuit Judge.

ENGEL, Circuit Judge. Appellants were convicted in a non-jury trial of conspiring to distribute an obscene film, "School Girl", in interstate commerce, in violation of 18 U.S.C. §§ 371 and 1462 (1976). Their principal claim in this appeal is that they were prejudiced because the case was tried under the obscenity standards of *Miller* v. *California*, 413 U.S. 15 (1973),

only to be decided later by the trial judge under pre-*Miller* standards.

We hold upon the record before us that there was no prejudice which affected the substantial rights of the appellants and, finding no other error in the trial, affirm the convictions.

The indictment, returned by a federal grand jury in Memphis, Tennessee, on February 15, 1973, charged 25 individuals and organizations with conspiring to distribute "School Girl" in interstate commerce. The detailed allegations of the indictment and the overt acts expressly incorporated in it described activity which commenced with the production of the motion picture by certain of the conspirators, the sale of the rights in the movie to the defendant Sherpix for a total of $41,000, and the subsequent distribution for public exhibition of the film throughout the country by means of the various services offered by the remaining named defendants. The conspiracy charge, which was embraced in count 1 of the indictment, was fortified by five additional counts in which certain of the conspirators were charged with the substantive offenses of shipping the film in interstate commerce by use of a common carrier, contrary to 18 U.S.C. §§ 1462 and 2.

Of the 25 defendants charged in the conspiracy count, 15 waived jury and elected to be tried before the district judge. Seven other defendants, including all who were tried on the substantive charges, proceeded to trial by jury immediately following the non-jury trial of the appellants involved here.[1]

All of the defendants who insisted upon their right to jury trial were acquitted on the conspiracy count but were found guilty of the several substantive offenses charged against

[1] As for the remaining three alleged conspirators, John O. Glaus Agency was not tried, although appellant John O. Glaus, individually, was tried and convicted. Paul David Gerber a/k/a David Reberg, one of the conspirators responsible for the production of "School Girl," apparently was not apprehended and brought to trial. A third defendant, Bernard Levy, was dismised by an order of *nolle prosequi*.

them.[2] Conversely in the non-jury trial before District Judge Robert M. McRae, Jr., three defendants were acquitted and the remaining twelve were convicted, eight of whom have appealed here.

I.

In the non-jury trial held January 5-6, 1976, District Judge Robert M. McRae, obedient to our circuit's decision in *United States* v. *Marks*, 520 F. 2d 913 (6th Cir. 1975) (*Marks I*), considered that his determination of the issue of obscenity was to be governed by the standards set forth in *Miller* v. *California*, 413 U.S. 15 (1973), although all events alleged in the indictment occurred before *Miller* was decided. However, after the trial of the case but before filing his decision and entering judgment, the district judge learned that the Supreme Court had granted certiorari in *Marks*, *supra*, and accordingly delayed further proceedings in the case until the appeal was decided. On March 1, 1977, the Supreme Court held that persons indicted for conduct occurring before *Miller* were entitled to all of the benefits which *Miller* might confer, but were also entitled to application of the pre-existing *Roth-Memoirs*[3] test of obscenity, which primarily provided that materials could not be found to be obscene unless they were "utterly without redeeming social value." *Marks* v. *United States*, 430 U.S. 188, 196-97 (1977) (*Marks II*). On July 28, 1977, approximately five months after the Supreme Court's decision in *Marks II*, Judge McRae filed his findings of fact and conclusions of law. Applying both the *Miller* and *Roth-Memoirs* tests,[4] he adjudged the film to be obscene and found the appellants guilty.

[2] The trial court later ordered new trials because the jury had been erroneously charged on the definition of obscenity.

[3] *Roth* v. *United States*, 354 U.S. 476 (1957); *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966).

[4] The appellants' claim that the trial court in fact only applied the *Miller* test is not correct.

As noted in *Hamling* v. *United States*, 418 U.S. 87, 99 (1974), the definition of obscenity announced in *Roth* was substantially refined by the plurality opinion in *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966). To fall outside constitutional protection under *Memoirs*, "it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." 383 U.S. at 418.

Miller v. *California, supra*, revised the *Roth-Memoirs* test determining obscenity in the following language:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific values.

Miller v. *California, supra*, 413 U.S. at 24. The standards announced in Miller were made applicable to federal obscenity trials in *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123, 129-30 & n. 7 (1973).

No appellant has disputed the trial judge's factual description of the content of "School Girl":

> The school girl portrayed in the movie is a college student who undertakes to research a sex subculture. In order to do this she responds to certain classified ads in the college underground newspaper. This leads to a series of sexual episodes which include having sexual intercourse with a husband under the wife's direction and ultimate participation as a third party, mutual masturbation pursuant to direction from a man over the telephone, sexual intercourse oral and otherwise with a father and son team, and a group sex orgy. In addition, there are episodes in which complete actual and prolonged sexual intercourse between the school girl and her boyfriend is shown. There is a similar episode portrayed between the school girl's female roommate and the school girl's male professor who called at their apartment to inquire about the welfare of the school girl. In addition the school girl and her female roommate are shown in a prolonged lesbian episode.
>
> All episodes show close shots of the genitals of the participants during the sexual encounters.[5]

No party has claimed that under either test the film is constitutionally protected as a matter of law.[6] The issue, therefore, is whether any prejudice affecting the substantial rights of the defendants occurred because the case was tried under the *Miller* standards, but was finally decided under both *Miller* and pre-*Miller* standards.

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[5] Upon express inquiry by the court at oral argument, all parties expressed the opinion that it was not necessary to the appeal that the judges view the film. *See United States* v. *Marks*, 585 F. 2d 164, 171 (6th Cir. 1978) (*Marks III*). We therefore accept the trial court's account as accurate.

[6] It seems to be characteristic of this kind of case that it is susceptible to many hypothetical dangers — dangers that innocent and unsuspecting defendants will be swept into the conspiracy dragnet, and dangers arising out of a very justifiable sensitivity to First Amendment rights. *See, e.g., Paris Adult Theatre I* v. *Slayton*, 413 U.S. 49, 83-101 (1973) (Brennan, J., dissenting). Nevertheless, on a case-by-case basis, those dangers turn out to be more theoretical than real, for rarely is it argued with any force that the material in question is as a matter of law not obscene, and that claim is not made here. One reason for this, we suspect, is that where material has any remote relation to the values protected by the obscenity tests, a generally tolerant society tolerates it in all events. A second, more important reason, we suspect, is that the commercial marketability of obscene materials depends in major part upon the very absence of those qualities which lift that material into the area of First Amendment protection.

We conceive that prejudice to substantial rights could exist by a midstream change in the rules such as occurred here.[7] We are, however, unable realistically to conceive of any prejudice upon this record.

Having lost below, all appellants indicate in this appeal that they wish to have a new trial based upon pre-*Miller* standards. There is, however, no complaint that the district court erred in excluding any evidence proffered by the defendants, although they now claim that the making of an offer of proof would have been an expensive and futile gesture in view of the court's pretrial ruling that *Roth-Memoirs* would not be applied. *But see* Rule 103(a)(2), Fed. R. Evid. While there was some suggestion on appeal that certain of the defendants might have wished, as a matter of afterthought, to introduce further expert testimony on the obscenity question and its application under pre-*Miller* standards, nothing concrete has been offered or even suggested which would indicate how the defendants would have conducted themselves differently, had it been known at the time of trial that pre-*Miller* standards were still applicable.

More particularly, certain appellants, notably Gordon, complain that the submission of the case on the *Miller* standards denied them an opportunity to "present evidence or argue that the film did not violate the *Memoirs* test, particularly the last part, requiring that the material be 'utterly without redeeming social value' for it to be found obscene." The simple answer to this, as we mentioned above, is that no offer was ever made, although many months elapsed from the date of trial due to the trial court's decision to wait for further guidance from the Supreme Court. More particularly, despite an interval of

[7] Judge McRae, in fact, for this reason set aside the jury conviction of the co-defendants and ordered a new trial under pre-*Miller* standards. There is, however, a substantial difference between the defendants tried to the jury and those who opted for trial to the court. The jury had been charged only according to *Miller* standards, while the judge in the bench trial expressly evaluated the film under both *Miller* and *Roth-Memoirs*.

nearly five months between the Supreme Court's decision in *Marks* and Judge McRae's opinion, not one defendant sought any right to re-argue the case under the old standards, or to submit additional evidence or to make any offer of proof as to what additional evidence he wished to submit, once the standard had been clarified. We can only view this, therefore, as an effort to obtain a second bite of the apple, and not as any claim of serious prejudice to any right of fair trial.

A somewhat similar problem arose in *Hamling* v. *United States, supra*, when it appeared that the instructions given by the district court in the jury case made occasional reference to the community standards of the "nation as a whole," thereby delineating a wider geographical area than normally would have been warranted by *Miller*:

> In the unusual posture of this case, in which petitioners agree that the challenged instruction was proper at the time it was given by the District Court, but now seek to claim the benefit of a change in the law which casts doubt upon the correctness of portions of it, we hold that reversal is required only where there is a probability that the excision of the references to the "nation as a whole" in the instruction dealing with community standards would have materially affected the deliberations of the jury. [citations omitted] Our examination of the record convinces us that such a probability does not exist in this case.

Hamling, supra, 418 U.S. at 108. Of course, the likelihood of prejudice is even less in the instant case than in *Hamling*, since Judge McRae, as trier of fact, properly recognized and applied both the *Miller* and *Roth-Memoirs* tests in judging the obscene nature of the film.

We are convinced that under the circumstances here, neither the parties' trial strategy, their decision to have waived a jury, nor the trial judge's consideration of the evidence, were adversely affected by the fact that the case was tried upon the

understanding of the law prevailing in our circuit and decided on a somewhat variant and later construction announced by the Supreme Court. Had the record shown some meaningful distinction which could have affected the result here and which would render it unfair for the parties to be bound by the trial court's decision, we would not hesitate to reverse. Such is not the state of the record here.

II.

Each appellant argues, in one form or another, that he is entitled to acquittal as a matter of law because the evidence was insufficient to connect him with one common enterprise which would qualify as a criminal conspiracy. As indicated earlier, the jury trial of the remaining defendants named in the indictment followed the non-jury trial before Judge McRae here and resulted in acquittal of the defendants therein of the conspiracy charge, although they were found guilty on substantive counts of transporting obscene material in interstate commerce by use of a common carrier. It is the claim of appellants that the government alleged a "wheel" type of conspiracy in which Art Theatre Guild and its subsidiary, Sherpix, as the owner and original distributor of the movie, were the hub, and in which the appellants, if anything, were merely spokes of the wheel having no relationship one to the other except through their common relationship with Sherpix and Art Theatre Guild. Because Sherpix and Art Theatre Guild were acquitted of the charge of conspiracy in the jury trial, the defendants reason that they must likewise be acquitted since it has been adjudicated through the acquittal, they claim, that Sherpix and Art Theatre Guild were not conspirators.

They place reliance upon a number of decisions which in effect hold that where all other alleged co-conspirators are acquitted of a conspiracy, the conviction of one person on that charge cannot be upheld, since it takes at least two to

commit the offense. *E.g.*, *United States* v. *Williams*, 503 F. 2d 50, 54 (6th Cir. 1974). *See also United States* v. *Lester*, 363 F. 2d 68, 72 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967). However this may be, and there is indeed much authority to the contrary commencing with *Dunn* v. *United States*, 284 U.S. 390 (1932) (Holmes, J.), and proceeding through *Hamling* v. *United States, supra*,[8] our careful examination of the record here persuades us that in all events, the essential link in the conspiracy was not missing here. Unindicated but named co-conspirator Saul Shiffrin, Executive Vice President of Sherpix and Art Theatre Guild, supplied that link in ample measure and it was his testimony which connected the defendants one to another and laid the cornerstone of the successful prosecution of the conspiracy. The indictment alleged and the proofs showed numerous overt acts undertaken by Shiffrin, notably arranging to transport the film into and out of the district of trial and contracting for the subdistribution of "School Girl" with the defendants.

The court, sitting as a trier of fact, specifically found that a conspiracy existed between the appellants and Shiffrin. Shiffrin's testimony, which was introduced at trial through his affidavit, amply supports that finding. *United States* v. *Shipp*, 359 F. 2d 185 (6th Cir.), *cert. denied*, 385 U.S. 903 (1966). Likewise, it is immaterial that Shiffrin was not himself charged in the indictment; he was named as an unindicted co-conspirator and the evidence at trial connected him with the conspiracy. *Feldstein* v. *United States*, 429 F. 2d 1092, 1095 (9th Cir.), *cert. denied*, 400 U.S. 920 (1970). *See also*

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[8] "It has, of course, long been the rule that consistency in verdicts or judgments of conviction is not required." 418 U.S. at 101. *See also United States* v. *Rowan*, 518 F. 2d 685, 689 (6th Cir.), *cert. denied*, 423 U.S. 949 (1975) ("[a] jury is free to render inconsistent verdicts or to employ relevant evidence in convicting on one count that it may seem to have rejected in acquitting on other counts."); *United States* v. *Fleming*, 504 F. 2d 1045, 1055 (7th Cir. 1974); *Developments in the Law — Criminal Conspiracy*, 72 Harv. L. Rev. 920, 974 & n. 401 (1959).

Developments in the Law - Criminal Conspiracy, 72 Harv. L. Rev. 920, at 972-73 (1959).

It is a well-established general rule that inconsistent jury verdicts are not fatal to a conviction, they being "one of the consequences which we accept under our jury system," *Miller* v. *California*, 413 U.S. at 26 n. 9. *See also Dunn, supra*, 284 U.S. at 393-94, and *Hamling, supra*, 418 U.S. at 100-01. In view of this authority we think that the rule in *Williams* and like cases is necessarily confined to those circumstances in which the allegations of the indictment and the proofs at trial admit of no other conspiratorial agreement than that existing between the one convicted defendant and other conspirators, all of whom have been acquitted of the specific charge. *Developments, supra*, 72 Harv. L. Rev. at 972-73, and cases cited therein. This circumstance does not exist in the instant case.

Allied with the claim of insufficiency of the evidence is the claim of several of the defendants that not one but several conspiracies were shown because the proofs indicated only individual, isolated agreements to acquire and display the film, rather than the single, unified conspiracy, which appellants claim is necessary to their joint trial and conviction. Essentially the defendants rely upon *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and its justifiable concern that in conspiracy cases the defendants have a right "not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others. . . ." *Id.* at 775. *See also United States* v. *Mayes*, 512 F. 2d 637, 642-43 (6th Cir.), *cert. denied*, 422 U.S. 1008 & 423 U.S. 840 (1975). If anything, the conspiracy here alleged and proved has a singular unity in its confinement to the distribution in interstate commerce of but one film. It is apparent that by narrowly describing the conspiracy, many of the legitimate apprehensions of injustice reflected in *Kotteakos* were avoided. As the trial court noted in its findings of fact:

> Because there are a limited number of copies of the film, it is understood and agreed by those members of the distribution network that they will ship the copies to other areas (interstate) when directed to do so by the owner or distributor of the film. The proof reflects that this was not only agreed to but was done by some of the sub-distributors. . . .
>
> Furthermore, the sub-distributors and the distributor were financially interested in an efficient and systematic method of making the copies available when and where needed.

The interdependence of the sub-distributors and their agreement to act in concert with one another in the circulation of the film provided the "rim of the wheel" and thus tied them together in a single criminal undertaking. *Kotteakos, supra*, 328 U.S. at 755; *Mayes, supra*, 512 F. 2d at 642-43; *United States* v. *Vartelli*, 407 F. 2d 735, 741-42 (7th Cir, 1969), *appeal after remand*, 467 F. 2d 1032 (7th Cir. 1972), *cert. denied*, 410 U.S. 982, 990 (1973). It, therefore, appears to us from the evidence here that one conspiracy was shown to have existed, a conspiracy to participate in the interstate distribution and showing, for profit, of "School Girl."[9]

III.

Appellants also claim that the acquittal of Sherpix, Art Theatre Guild, and sub-distributor Gordon Craddock and Craddock Films, *inter alia*, in the earlier jury trial as a matter of law deprived the Western District of Tennessee of venue since "all allegations of overt acts committed in the Western District of Tennessee are those of Sherpix, Inc., Art Theatre Guild, Inc., Gordon Craddock and Craddock Films, Inc." The

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[9] It might be that the defendants, or some of them, were equally guilty of conspiring to distribute other obscene films and that conduct was also a part of the "School Girl" conspiracy. That, however, need not concern us here. Defendants could not be injured if the government elected to confine itself to the narrower aspects of a single conspiracy.

claim is simply without factual support in the record. The indictment also alleged, *inter alia*, overt acts committed by unindicted co-conspirator Shiffrin, and the evidence supported those allegations. More fundamentally, however, we do not view the acquittal of Sherpix, Art Theatre Guild, Craddock and Craddock Films on the conspiracy charge as conclusive evidence that, for the purposes here, they did not actually commit the overt acts charged to them in the indictment. *See United States* v. *Samuel Dunkel & Co.*, 184 F. 2d 894, 898 (2d Cir. 1950), *cert. denied*, 340 U.S. 930 (1951). In fact, all four were convicted on substantive counts which formed the basis of the overt acts alleged to have been committed by them in the conspiracy count.

We know of no rule which obliges a trier of fact to disregard the evidence relating to a defendant who has been acquitted of a particular crime in the trial of a co-defendant. As earlier mentioned, the rule in *Williams, supra*, relied upon by defendants, is not a rule of evidence but of sufficiency. Therefore, where the sufficiency is fully shown by the participation of unindicted co-conspirator Saul Shiffrin, that issue is at an end.

The proofs clearly show several overt acts occurring in the Western District of Tennessee. The trial court specifically found that "Sherpix and Art Theatre Guild, acting through its authorized employees caused 'School Girl' to be shipped in interstate commerce to Memphis, Tennessee (Western District of Tennessee) on or about March 1, 1972." Shiffrin's testimony indicates he personally arranged for the transportation of the film into Memphis. On June 15, 1972, Sherpix caused a print of "School Girl" to be shipped by common carrier from Memphis to appellant Allied Film Exchange in Detroit, and again on June 5, 1972, Gordon Craddock, at the direction of Shiffrin, caused a print of the movie to be shipped by interstate commerce to Memphis and subsequently to Springdale, Arkansas, from Memphis. Venue for the conspiracy count was properly laid in the Western District of Tennessee. *Hyde* v. *United States*, 225 U.S. 347, 365-67 (1912); Rule 18, Fed. R. Crim. P.

Closely allied to the foregoing argument is the claim that the various defendants were unfairly tried in Memphis because the allegedly puritanical local standards of that community subjected them to judgment of guilt based upon standards which might not exist in the several other areas of the country where they had displayed or circulated the film. We view this claim as but another facet of the same venue argument.

Once the conspiracy to which they belonged was shown to have extended to and operated in Memphis, the defendants had no right to have the obscenity of the film tried according to the community standards of other localities in which they might conceive public attitudes to be more permissive. In *Art Theatre Guild, Inc.* v. *Parrish*, 503 F. 2d 133 (6th Cir. 1974), *cert. denied*, 420 U.S. 995 (1975), wherein we ruled on a motion for return of the same seized film, we observed:

> The Supreme Court in *Hamling* v. *United States*, . . . touches on this problem [prosecution of a nationwide conspiracy case] and indicates how a district judge sitting in one district can handle the "contemporary community standard" requirement when faced with a federal prosecution and the need to consider its application in several districts.

Id. at 137. *Hamling* indicates that even where a federal obscenity offense is multistate in its scope, the community standards of the locality of trial, not some "hypothetical and unascertainable" nationwide standards, are to be applied:

> A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a "reasonable" person in other areas of the law.
>
> • • •

> The result of [*Miller* v. *California* and companion cases], therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion "the average person, applying contemporary community standards" would reach in a given case. Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the jurors would draw.

418 U.S. at 104, 105-06.

While the appellants have not argued that the nationwide scope of the conspiracy requires application of a national standard in judging the film, they claim that the trial court should have applied a multitude of local standards, depending upon the distribution area which each conspirator served. This is not the law under either *Miller* or pre-*Miller* standards, as *Miller* and *Hamling* clearly demonstrate. *Hamling* contemplates that persons guilty of substantive offenses which overlap judicial districts subject themselves to the application of varying local standards, depending upon the locality of trial, and we see no reason to devise a different rule for multistate conspiracies:

> The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of appliction of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the States for violations of state obscenity statutes; we see no constitutional impediment to a similar rule for federal prosecutions. In *Miller*

> v. *California*, 413 U. S., at 32, we cited with approval Mr. Chief Justice Warren's statement:
>
> > "[W]hen the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable 'national standard,' and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a 'community' approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals." *Jacobellis* v. *Ohio*, 378 U. S. 184, 200-201 (1964) (dissenting opinion).

Hamling, supra, 418 U.S. at 106-07. Having voluntarily chosen to enter a conspiracy of national scope, appellants limited their right to be tried according to the standards of the localities in which their operations are centered.

A related claim is appellants' assertion that the district court abused its discretion in failing to permit introduction of evidence concerning the standards of communities outside the Western District of Tennessee. It is true that prior to trial, counsel for Gordon indicated a desire to offer evidence concerning the prevailing standards of New England, to which the trial judge replied, "I don't think we need any proof along those lines." This ruling was made in advance of the trial and counsel never stated what proof they intended to offer into evidence, nor was any formal offer of proof made at trial. Assuming, without deciding, that the pretrial offer and the judge's ruling were sufficient to preserve the issue for review

at this stage, *but see* Fed. R. Evid. 103(a)(2), we nevertheless read *Hamling* as leaving such decisions largely to the discretion of the trial judge,[10] a discretion which we find was not abused under the circumstances here.

IV.

Appellants Sandy and Friedlander particularly complain that the evidence was insufficient to uphold the district court's finding that they possessed the requisite scienter concerning the nature of the film. No claim is made that the district court misreprehended the governing legal principles. In this respect the trial judge correctly followed *Hamling* to observe that "it is not necessary for the government to prove that the conspirators had actual knowledge that the film was obscene. The scienter required to support a conviction is that they knew the general nature and character of the films." *See Hamling, supra*, 418 U.S. at 123.

While necessarily circumstantial, the evidence nevertheless strongly supports the trial judge's finding in this respect. The evidence indicated extensive discussions between Shiffrin and the defendants with respect to the film and its display elsewhere. The finder of fact, whether trial judge or jury, is not obliged to lay aside his general knowledge of life in evaluating the evidence and the several communications which were a part of the evidence. There was proof that some of the appellants handled other sexually explicit films for Sherpix. There was evidence that, as part of his sales pitch, Shiffrin

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[10] After holding that the trier of fact in a federal obscenity prosecution should draw upon the community standards of the vicinage of trial, *Hamling* noted:

> [b]ut this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide.

418 U.S. at 106.

represented to each sub-distributor that the film had been shown at the Lido East and Cini Lido in New York, known in the industry as theaters specializing in the exhibition of X-rated films. The defendants knew that the film was itself X-rated.[11] While some X-rated films may not be obscene, it asks too much of credulity to expect that under the circumstances the defendants could not have known of the general nature and character of "School Girl," even though there may not have been proof that they actually viewed the film. There is thus substantial evidence to support the trial judge's finding that these defendants possessed the necessary degree of scienter.

V.

Finally, appellant Friedlander claims that his constitutional right to a speedy trial was violated in the delay between the return of the indictment in February, 1973 and the trial before Judge McRae in January, 1976. He claims particular prejudice stemming from the death of the other principal employee, besides himself, of Marvin Films, who, it is claimed, would have testified at the trial. No effort is made to show how the

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[11] Although Sandy asserts that there is no evidence that an X-rating generally contemplates sexually explicit material, we find applicable to the trial judge's role in non-jury cases the same observations we made with respect to jury's general knowledge in *United States* v. *Jones*, 580 F. 2d 219 (6th Cir. 1978).

> While Wigmore notes that "[t]he range of [a jury's] general knowledge is not precisely definable," [9] *Wigmore* [*on Evidence*] § 2570 at 546 [(3d ed. 1940)], "the scope of this doctrine is narrow; it is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and everyday life." *Id.* at 544. This category of fact is not so much a matter of noticing facts outside the record as it is a matter of the communication value of the words used, which can only be understood in the light of the common experience of those who employ them. *See generally* K. Davis, Administrative Law Text § 15.06 at 305 (3d ed. 1972).

Id. at 222. The trial court did not err in its understanding of the term, "X-rated."

four-pronged test of *Barker* v. *Wingo*, 407 U.S. 514 (1972), applied here, would produce a holding of constitutionally impermissible delay, and we find none.

The remaining allegations of error are mostly variations of those already discussed. We find no merit in them.

Affirmed.

Exhibit B.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 77-5367-8-9-70-71

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEROME SANDY AND AMERICAN PICTURE EXCHANGE, (77-5367)
ELLIS GORDON, (77-5368)
MARVIN ZIDE AND ALLIED FILM EXCHANGE, INC., (77-5369)
JOHN O. GLAUS, (77-5370)
MARVIN FRIEDLANDER AND MARVIN FILMS, (77-5371)
Defendants-Appellants.

Before: ENGEL AND KEITH, Circuit Judges, and PECK, Senior Circuit Judge.

Judgment.

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

Entered by order of the Court.

JOHN P. HEHMAN,
Clerk.

Filed July 27, 1979.
Issued as Mandate August 17, 1979.

Exhibit C.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. No. CR-73-45

PAUL DAVID GERBER, ET AL.,
Defendants.

Memorandum Decision Setting Forth Findings of Facts and Conclusions of Law.

On January 5, 1976 and January 6, 1976, Richard Louis Miller; Ellis Gordon; Marvin Friedlander; Marvin Films, Inc.; Martin Zide; Allied Film Exchange, Inc.; Jerome Sandy; American International Pictures Exchange of Washington, D.C., Inc.; Abbott Morton Swartz; Independent Film Distributors, Inc.; Emanuel Youngerman; M.Y. Film Company, Inc.; John O. Glaus; Lou Wolff; and Harry Brandt Booking Office, Inc., all defendants in the instant case, participated as defendants in a non-jury trial concerning the offense alleged against them in the Indictment in the instant case.

Immediately thereafter a protracted jury trial was conducted with regard to certain other individual and corporate co-defendants in this cause. In that trial, the issue of obscenity was vigorously contested. Upon the basis of *USA* v. *Marks*, 520 F.2d 913 (C.A. 6, 1975), the standard for determining

obscenity was considered to be those standards enumerated in the *Miller* v. *California*, 413 U.S. 15 (1973) and other cases decided on the same date, even though the alleged criminal conduct occurred before Miller was announced.

With regard to the defendants who agreed to this non-jury trial, it was agreed that these defendants would not offer expert proof upon the issue of obscenity, and that this issue would be determined by the Court, based upon the Court's viewing of the movie at the same time that the jury viewed the movie for the purpose of determining whether the movie was obscene in the matter of the trial of the other defendants.

After the jury trial of the other defendants, but before this Court sentenced those found guilty and before the Court filed its Findings of Facts in this phase of the case, it was learned that the United States Supreme Court had granted *certiorari* in *U.S.* v. *Marks*, 424 U.S. 942 (1976). Pending a ruling in that case, all phases of the instant case were stayed. On March 1, 1977, the Supreme Court issued its ruling in *Marks*, which reversed the Court of Appeals for the Sixth Circuit and held that certain *Miller* v. *California*, *supra*, standards did not apply to pre *Miller* conduct.

This is the belated ruling upon the non-jury phase of the case. All of the defendants being considered were indicted in Count I of the Indictment, which charged that these defendants and all other defendants in the case were engaged in a conspiracy to violate the law pertaining to transportation of obscene moving picture film.

Conspiracy

All the defendants are said to have been members of a conspiracy, the main purpose of which was to knowingly use common carriers in interstate commerce in order to transport an

obscene movie entitled "School Girl." There are fifteen defendants included in this ruling. All but one of these defendants, Richard Lewis Miller, are individuals or corporations that were engaged in the business of distributing motion picture films in accordance with a system of distribution which has evolved in the motion picture industry.

Twelve of these fifteen defendants are composed of six pairs of individual defendants who are affiliated with corporate counterparts, i.e., Marvin Friedlander and Marvin Films, Inc.

The defendant named in the Indictment as "Richard Lewis Miller, a/k/a R. L. Mills" was shown by the proof to be Richard Louis Miller, who also used the name R. L. Mills in the matter of his participation in the production and sale of the motion picture "School Girl."

The defendant Richard Louis Miller, under the name of R. L. Mills produced the motion picture film entitled "School Girl," and allowed this fact to be advertised by including this fact as a part of the introduction of motion picture film in that portion of the film normally referred to as the credits.

Prior to August 26, 1971, the defendant Richard Lewis Miller, along with Paul David Gerber, owned all rights and interest in and to the film entitled "School Girl." On August 26, 1971, the defendant Richard Louis Miller and Paul David Gerber in the State of California sold all of their interest in the motion picture film entitled "School Girl" to Sherpix, Inc., another defendant, and received $41,000 at San Francisco, California, which payment included payment for a complete and final transfer of all rights, title, and interest in and to the motion picture film "School Girl."

In connection with the transfer, Richard Louis Miller agreed by written instrument to indemnify Sherpix, Inc. for any claim by R. L. Mills; and Sherpix, Inc., by written agreement, agreed not to use the name Paul David Gerber in the

distribution of said film in any connection as the maker of said motion picture film.

Prior to the time of the purchase of "School Girl" and subsequent thereto, Sherpix engaged in the business of distributing motion pictures. Art Theatre Guild, Inc., which operated theatres throughout the United States, and Sherpix were owned and controlled at all times relevant hereto by Louis K. Sher, an individual co-defendant not covered by this ruling. Sherpix had distributed a variety of types of motion picture films. However, it had begun to concentrate on X-rated sexually explicit movies.

In the film business a motion picture is customarily manufactured or created by a person called a producer. Once a film is created, arrangements are customarily made with a so-called distributor to sell the film to exhibitors. The distributor is responsible for all of the details involved in distribution of the film, including the preparation of advertising materials, shipment of prints, availability of prints and similar matters. Bookers are people or companies that arrange films for exhibitors.

The exhibitor and the distributor customarily agree that the exhibitor will have a copy of one of the prints of the motion picture for a given period of time, and in exchange the exhibitor agrees to remit to the distributor a certain prearranged percentage of the monies received from paying patrons.

If a film becomes sought after by many exhibitors, the distributor will utilize sub-distributors to assume responsibility for the distribution of the film in separate geographical areas which have been assigned to the sub-distributors by custom within the industry.

In those instances where a sub-distributorship is involved, the exhibitor customarily remits a percentage of the monies received from paying patrons to the sub-distributor, who then

divides this amount according to an agreed percentage with the prime distributor.

After August 26, 1971, Sherpix undertook the distribution of the film "School Girl" on a national basis. Sherpix arranged for the exhibition of the film "School Girl" at the Cine Lido Theatre and the Lido East Theatre in New York City, which theatres had reputations in the motion picture industry for showing sex-oriented films.

The use of sub-distributors commenced after distribution of "School Girl" had become so widespread and extensive and the demands on Saul Shiffrin, an executive of Sherpix, so great that it became profitable to Sherpix to utilize services of sub-distributors in the continued distribution of "School Girl."

No written agreements were made with any sub-distributor for the distribution of the film in any given geographical area.

Saul Shiffrin was familiar with the people who acted as independent sub-distributors in various areas of the United States and had known them all well as a result of prior contact in the motion picture industry.[1]

Sherpix reserved to itself the right of approval of the exhibition of the film "School Girl" in any theatre, including the theatres operated by its affiliate, Art Theatre Guild.

Basically, each sub-distributor was assigned a specific geographical area, and he was the exclusive sub-distributor within that geographical area.

Because there are a limited number of copies of the film, it is understood and agreed by those members of the distribution network that they will ship the copies to other areas (interstate) when directed to do so by the owner or distributor of the

[1] Saul Shiffrin was granted immunity and furnished much of the information and testimony in various phases of this case, albeit at times reluctantly. Trial Exhibit 1 in this phase of the case is a 19-page stipulation of his testimony.

film. The proof reflects that this was not only agreed to but was done by some of the sub-distributors.

Since 1958, Ellis Gordon has been in business as an independent sub-distributor of motion picture films. Ellis Gordon operated Ellis Gordon Films as a sole proprietorship approximately thirteen years prior to February 23, 1972. During the period February 23, 1972 through September 17, 1975, Ellis Gordon Films was operated by Ellis Gordon and Michael Fleischer as a partnership.

As a sub-distributor, it was the responsibility of Ellis Gordon Films to find exhibitors for such films as were assigned to it for distribution by a producer or nation-wide distributor.

In 1968, Ellis Gordon, on behalf of Ellis Gordon Films, agreed with Saul Shiffrin acting on behalf of Sherpix that Ellis Gordon Films would distribute in New England films distributed nationally by Sherpix.

The agreement to distribute Sherpix films in New England made in 1968 was a verbal agreement and did not obligate Ellis Gordon Films to distribute each and every film made or distributed by Sherpix.

Ellis Gordon films acted as a sub-distributor of the film "School Girl" during the period set forth in Count I of the Indictment pursuant to the 1968 agreement. In talking to Mr. Gordon, Mr. Shiffrin told him that "School Girl" was playing in the Lido East and the Cine Lido Theatres in New York, was doing quite well, and that it was an X-rated movie.

Although there was testimony that pictures are given X ratings for other reasons, the testimony shows that usually the X rating means that the movie contains explicit sexual activity.

Ellis Gordon arranged to distribute the film "School Girl" for exhibition at approximately fifteen theatres in the States of Massachusetts, Connecticut, Vermont, and Maine. He did receive it via interstate shipment.

Ellis Gordon had an interest in the success or failure of other sub-distributors in the course of the distribution of the film "School Girl" on a national basis because the attendant notoriety and publicity made it a more saleable movie. Furthermore, the sub-distributors and the distributor were financially interested in an efficient and systematic method of making the copies available when and where needed.

The other defendants being considered by this ruling who were solicited and served as sub-distributors of the motion picture "School Girl" in a fashion similar to the defendant Ellis Gordon were as follows:

> Marvin Friedlander, an individual defendant, was the president of the defendant Marvin Marvin [*sic.*] Films, Inc., a New York corporation. Their geographical area of sub-distribution was New York and New Jersey, where they did cause the movie "School Girl" to be shown. They also received and shipped the movie in interstate commerce.

The individual defendant Martin Zide and the corporate defendant Allied Film Exchange, Inc., sub-distributors of the movie "School Girl" for Detroit, Michigan. They did ship and receive a copy of the movie in an exchange via interstate commerce with persons or companies who were part of the distribution network.

The individual defendant Jerome Sandy and the corporate defendant American International Pictures Exchange of Washington, D.C. served as sub-distributors who caused the movie "School Girl" to be exhibited in Norfolk, Virginia. They did ship and receive a copy of the movie in an exchange via interstate commerce with persons or companies who were part of the distribution network.

The individual defendant Abbott Morton Swartz and the corporate defendant Independant Film Distributors, Inc. contend that they were not in fact sub-distributors of the movie "School Girl." However, they had previously negotiated with Saul Shiffrin on behalf of Sherpix, Inc. to serve as a sub-distributor for several other films, including "The Stewardesses." They did cause the exhibition of the movie "School Girl" in Moline, Illinois; Des Moines, Iowa; Heron Lake, Minnesota; and Slayton, Minnesota, for which they received the sub-distributor's fee on three of those occasions, and they did cause copies of the movie "School Girl" to be shipped and received in interstate commerce.

The individual defendant Emanuel Youngerman and the corporate defendant M. Y. Film Company, Inc. served as sub-distributors who caused the movie "School Girl" to be exhibited in parts of Pennsylvania and New Jersey. They did ship and receive a copy of the movie in exchange via interstate commerce with persons or companies who were part of the distribution network.

The individual defendant John O. Glaus, d/b/a John O. Glaus Agency, served as a sub-distributor who caused the movie "School Girl" to be exhibited in the geographical area known historically in the movie distribution industry as Western Pennsylvania. At the request of Sherpix, Inc., the distributor, John O. Glaus shipped the motion picture to Toledo, Ohio, and Buffalo, New York, in furtherance of the distribution and exhibition of the movie.

According to the stipulated proof, the individual defendant Louis Wolff was a long-time employee of the corporate de-

fendant Harry Brandt Booking Office, Inc. A booking agent serves the movie industry in a different capacity from the sub-distributor. The booking agents provide a service to the exhibitors for a fee; namely, they obtain film for exhibition on certain dates. In order to be able to assure the exhibitor that a film would be available the booking agent dealt with the distributor or sub-distributor, but only for the purpose of bringing the distributor or sub-distributor and the exhibitor together for further arrangements. At that time the booking agent stepped out of the picture.

In some instances in the initial stages of the distribution of a film the distributor will contact a booking agent known to represent certain exhibitors in order to build a reputation and acclaim for the film. In the instant case the proof reflects that Saul Shiffrin, acting for Sherpix, Inc., personally engaged in a conversation with Lou Wolff and encouraged him to initiate the necessary procedures at Brandt Booking Office to book "School Girl" for exhibition at Trans-Lux Theatre in Washington, D.C., in order to build acclaim for this X-rated movie. Later the necessary business arrangement between Sherpix and Harry Brandt Booking Office was made whereby "School Girl" was made available for exhibition at the Trans-Lux Theatre in Washington, D.C.

The distribution of the movie "School Girl" in the manner hereinbefore indicated occurred between a time on or about November 1, 1971, when the initial 35 mm print of "School Girl" was ready for distribution, and some date after July 31, 1972. "School Girl" was exhibited in 83 separate theaters located in 19 separate states. Before July 31, 1972, Sherpix had received approximately $211,000 as its distributors' share of the profits.

Sherpix and Art Theatre Guild, acting through its authorized employees caused "School Girl" to be shipped in interstate commerce to Memphis, Tennessee (Western District of

Tennessee) on or about March 1, 1972. From on or about March 2, 1972, until May 25, 1972, "School Girl" was shown at the Studio Theatre in Memphis, Tennessee, one of the numerous theatres operated by Art Theatre Guild in various parts of the United States.

On or about June 15, 1972, Sherpix caused a print of "School Girl" to be shipped by common carrier from Memphis, Tennessee, to the sub-distributors Allied Film Exchange at Detroit, Michigan.

On or about June 5, 1972, Gordon Craddock, an individual co-defendant, acting for Craddock Films, Inc., a corporate co-defendant, caused a print of the movie "School Girl" to be shipped by interstate commerce to Memphis, Tennessee, and subsequently to Springdale, Arkansas, from Memphis, Tennessee.

SCIENTER

When the Indictment charges a conspiracy to transport an obscene motion picture in interstate commerce, it is not necessary for the government to prove that the conspirators had actual knowledge that the film was obscene. The scienter required to support a conviction is that they knew the general nature and character of the films. *US* v. *Marks*, 520 F.2d 913, 1917 (C.A. 6 1975) rev'd. on other grounds, *Marks* v. *US*, ____ U.S. ____ (Mar. 1, 1977); 45 USLW, 4233 (Mar. 1, 1977).

In the instant case the government relied upon circumstantial evidence in the cases against the defendants covered by this ruling.

The words "hard core," "pornography," "porn," "porno," "stag," "erotic," "sexploitation," and "sensual" mean to an adult person whose livelihood is derived from full-time employment in the motion picture distribution business that the

general nature and character of the motion picture film in question is one depicting, representing, and describing actual or simulated sexual activity.

Sherpix, prior to August 26, 1971, and continuing thereafter, was a national distributor of motion picture films which conducted its business from New York, New York.

Weekly Variety was in 1971 and 1972 and had been for many years prior to that time, a tradepaper distributed throughout the motion picture industry used as a vehicle of communication, advertisement, and informational source, and was used by persons whose livelihood is derived by motion picture films distribution as a tool for conducting business.

On February 10, 1971, *Weekly Variety* contained a review of a motion picture film entitled "The Story Of F," describing it as "unadulterated stag," "erotica," and "for hardcore buffs," and showing the distributor as Sherpix.

On February 10, 1971, *Weekly Variety* published a news article describing a motion picture film entitled "Mona" in bold 5/16ths-inch headline print as "Hardcore." The news article continues making reference to "rough sex material," "an extended stag film," and "the porno . . . dollar." The film is reported to be a Sherpix film. The article continues, making reference to "Adultery For Fun And Profit," soon to be released, as a film like "Mona."

Weekly Variety of February 24, 1971, contained a film review of a motion picture film entitled "Mona," describing it in some detail and again noting that it was being distributed by Sherpix.

On May 26, 1971, *Weekly Variety* published a film review of a motion picture film entitled "Pink Narcissus" consuming approximately 14 inches of one column, describing it in some detail and summarizing it as "a 70-minute masturbation fantasy" with an X rating and being distributed by Sherpix.

On June 23, 1971, *Weekly Variety* published a film review of a motion picture film entitled "Sub Rosa Rising" with a subtitle, "Sex In San Francisco," describing it in some detail, saying that it contained "peep at grindhouses and stag films, testimonies from all sides — literally — aimed at spelling sexploits among heteros, homos and bestial lovers." This motion picture film is shown to be distributed by Sherpix.

On May 3, 1972, *Weekly Variety* carried a two-column bold print headline concerning the Dutch Erotica Film Festival, sometimes known as the Wet Dream Film Festival, to be held in Amsterdam, Holland. The article refers to the fact that the president of Sherpix, Inc. (Louis Sher) obtained the film "Adultery For Fun And Profit" at the previous festival and has agreed to pay $1,000 for the first prize in the upcoming festival and to promise $5,000 in business to any films entered in the festival which Sherpix considers to be profitable for distribution in the United States.

On October 20, 1971, and October 27, 1977, *Weekly Variety* published full page advertisements for Sherpix, advertising the film "House of Wax" being distributed by it as a general release film. Said advertisements contained information blocked off in an approximately three-and-one-half-inch vertical block which spanned the width of the page describing how and from whom the film could be obtained. This information stated, "From the crew who gave you 'THE STEWARDESSES,' Sherpix, Inc. . . . and our local representatives . . ." Thereafter, the names, addresses and telephone numbers are listed for the following sub-distributor defendants in the instant case: Jerry Sandy, Ellis Gordon, Manny Youngerman, John Glaus, Marty Zide, Abbott Swartz, and Marvin Friedlander.

On November 3, 1971, *Weekly Variety* published a two-column headlined news article reporting the results of the movie festival at Amsterdam, Holland. Concerning the festival, the article reported "its predecessor was one of the first 'above ground' fests dedicated to the pornographic film, this year's fest was only one of several showcasing hard porn." The article continued, noting that Sherpix had entered three films in the festival, including "School Girl" and noting further that "School Girl" won the first prize.

On January 12, 1972, *Weekly Variety* published a news article on page 5 with a bold two-column headline stating, "N.Y. Pornopix 'Harrassment' Beaten; Some Doubt Smartness of Big Defy; Slowness of Law Favors Sites." The article continues and one column is continued on a second page. The second paragraph of the article concerns the fact that the motion picture film "School Girl," distributed by Sherpix, had won the Amsterdam Festival and had been seized by the New York Police Department while playing at the Cine Lido and the Lido East theatres in New York, New York.

On February 2, 1972, *Weekly Variety* on page 5 published under a column headline a news article concerning the Cine Lido Theatre in New York City describing it as the "flagship location for hardcore porno features." The article continues for an entire column and details the history of the theatre and refers to the fact that it had just completed a successful exhibition of the film "School Girl" distributed by Sherpix.

On September 27, 1972, *Weekly Variety* published a short news article on page 3 under the headline "It's Porno Biz As Usual." The article reports concerning exhibitions of sex-related films in New York City referring specifically to the Hollywood Twin theatres, stating "the twin houses have played 16m loops and hardcore feature subruns like 'School Girl' and 'Mona.'"

The original version of the motion picture film entitled "The Stewardesses," which admittedly was an outstanding box office success, depicts total male and female nudity with scenes showing male and female participants in sexual inter-

course without showing actual penetration, and depicts lesbianism with oral contact clearly showing.

Ellis Gordon sub-distributed, for and on behalf of Sherpix, the motion picture film entitled "The Stewardesses" to theatres for 47 separate exhibitions between March 5, 1971, and November 2, 1972.

Marvin Friedlander, by and through Marvin Films, Inc., sub-distributed, for and on behalf of Sherpix, the motion picture film entitled "The Stewardesses" to theatres for 110 separate exhibitions between March 1971 and January 1973.

Martin Zide, by and through Allied Film Exchange, Inc., sub-distributed, for and on behalf of Sherpix, the motion picture film entitled "The Stewardesses" to theatres for 67 separate exhibitions, 13 of which are admitted to be in the X-Rated versions, between May 19, 1971, and October 26, 1972.

Jerome Sandy, by and through American International Pictures Exchange of Washington, D.C., Inc., sub-distributed for and on behalf of Sherpix, the motion picture film entitled "The Stewardesses" to theatres for 22 separate exhibitions between February 24, 1971 and March 21, 1972.

Abbott Morton Swartz, by and through Independent Film Distributors, Inc., sub-distributed for and on behalf of Sherpix, the motion picture film entitled "The Stewardesses" to theatres for 102 separate exhibitions between February 26, 1971, and December 4, 1973.

Emanuel Youngerman, by and through M.Y. Film Company, Inc., sub-distributed for and on behalf of Sherpix, the motion picture film entitled "The Stewardesses" to a theatre for exhibition between January 5, 1972, and February 15, 1972.

John O. Glaus sub-distributed, for and on behalf of Sherpix, Inc., to theatres the motion picture film entitled "The Stewardesses" for 54 separate exhibitions between March 13, 1971, and September 11, 1973.

There were four other movies which were distributed by Sherpix and sub-distributed by the defendants Gordon; Friedlander; Marvin Films, Inc.; Zide; Allied Film Exchange, Inc.; Jerome Sandy; American International Pictures Exchange of Washington, D.C., Inc.; Abbott Morton Swartz; Independent Film Distributors, Inc.; Emanuel Youngerman; M.Y. Film Company, Inc.; and John O. Glaus, prior to or during the period during which they sub-distributed "School Girl." Those movies all depict oral sex, sexual intercourse, lesbianism, and exhibition of the genitals with sexual activity portrayed showing actual contact and penetration. The movies were "Mona," "Adultery for Fun and Profit," "History of the Blue Movie," and "Hollywood Blue."

On June 21, 1972, in the movie advertisement section of *The Detroit Free Press*, there was published an advertisement measuring approximately 7 1/2 by 4 1/2 inches showing a young female nude from the waist up with arms crossed over her breasts stating that the motion picture film "School Girl" was being exhibited at four neighborhood theatres. The advertisement contains the words in bold print, "How Much Mischief Can A Girl Get Into . . . If She Really Tries.'" The advertisement further states that the film is "A new lesson in erotica by Beyond The Pleasure Principle."[2] It shows the film to be X-Rated and for adults only. It further states that the film was the grand prize winner at the Amsterdam Erotic Film Festival.

On November 23, 1971, *The New York Times* had published the same advertisement on page 55, showing the film to be premiering on that date at the Cine Lido and the Lido East theatres in New York City. This advertisement varies only in

[2] This ad was used in various forms throughout the period of distribution of the movie. The art work and format were obtained by Sherpix on or before November 10, 1971.

that it does not show the film to be X-Rated, but has the word "Sex" written and further notes that it is a Sherpix release. Also, this ad is approximately 5 by 3 inches.

On February 2, 1972, a similar but not identical advertisement appeared in *The New York Times* advertising that the film was playing at 16 separate theatres in the New York City area including New Jersey.

On December 17, 1971, *The New York Times* had published the same advertisement which originally was published on November 23, 1971 for the Cine Lido and the Lido East theatres in New York City, except that the ad was reduced to 1 1/2 by 2 1/2 inches and carried the additional notation that it was playing in its second month.

The Washington Post and *The Evening Star And Daily News* in Washington, D.C., published in each of its editions from August 9, 1972, through October 3, 1972, a 2-inch by 1 1/2-inch movie advertisement for "School Girl" showing it to be playing at the Translux Theatre. This advertisement shows only the upper torso of a nude girl with her arms crossed over her breasts, the notation "How Much Mischief Can A Girl Get Into . . . If She Really Tries!", and the notation, "For Adults Only."

From March 1, 1972, through March 4, 1972, *The Pittsburgh Press* newspaper and *The Pittsburgh Post Gazette* newspaper published a movie advertisement measuring 2 by 4 inches advertising that the motion picture film "School Girl" was being exhibited at the Art Cinema. This advertisement bears the silhouette of a nude female with the notation, "New Hot Show Today Absolutely Unbelievable" and "No One Under 18 Admitted." The advertisement shows the motion picture film "School Girl" as being exhibited with another motion picture film entitled "Peddlers of Sin."

Obscenity

As heretofore indicated when this non-jury phase of the case was tried in January 1976, the issue of obscenity was submitted without expert proof and with the understanding that the Court would be the trier of fact on the issue, based upon the Court's viewing of the movie. At the time, the law in this Circuit was considered to be that *Miller* v. *California*, *supra*, standards were applicable to cases involving acts committed before the decision in *Miller* was announced June 21, 1973. This was based upon the holding of the majority in *United States* v. *Marks*, 520 F.2d 913 (C.A. 6, July 30, 1975). However, the Sixth Circuit ruling in *Marks* was reversed and remanded in *Marks* v. *United States*, ____ U.S. ____ (March 1, 1977). In that opinion the Supreme Court indicated that persons indicted for conduct occurring prior to the decision in *Miller* were entitled to a finding that materials were not obscene unless they are "utterly without redeeming social value," as required by *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966). In the *Marks* opinion the Supreme Court also held that in pre *Miller* conduct cases the defendants are entitled to "any constitutional principle enunciated in *Miller* which would serve to benefit" them. Footnote 3 of the *Marks* opinion provides:

> *Miller* held:
>
> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks

serious literary, artistic, political, or scientific value." 413 U.S. at 24.

Under part (b) of the test, it is adequate if the statute, as written or as judicially construed, specifically defines the sexual conduct, depiction of which is forbidden. The Court in *Miller* offered examples of what a State might constitutionally choose to regulate:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 413 U.S., at 25.

Applying tests set as required in *Marks*, this Court finds that the motion picture "School Girl" is in fact obscene. The Court has seen it two times in what is believed to be its entirety and in the form that it was caused to be transported and shown by the defendants herein. It is hard core pornography.

The school girl portrayed in the movie is a college student who undertakes to research a sex subculture. In order to do this she responds to certain classified ads in the college underground newspaper. This leads to a series of sexual episodes which include having sexual intercourse with a husband under the wife's direction and ultimate participation as a third party, mutual masturbation pursuant to direction from a man over the telephone, sexual intercourse oral and otherwise with a father and son team, and a group sex orgy. In addition, there are episodes in which complete actual and prolonged sexual intercourse between the school girl and her boyfriend is shown. There is a similar episode portrayed between the school girl's female roommate and the school girl's male professor who called at their apartment to inquire about the welfare of the school girl. In addition the school girl and her female roommate are shown in a prolonged lesbian episode.

All episodes show close shots of the genitals of the participants during the sexual encounters.

Summary and Conclusion

This Court concludes that the defendants Ellis Gordon; Marvin Friedlander; Marvin Films, Inc.; Martin Zide; Allied Film Exchange, Inc.; Jerome Sandy; American International Exchange of Washington, D.C., Inc.; Abbott Morton Swartz; Independent Film Distributors, Inc.; Emanuel Youngerman; M.Y. Film Company, Inc.; John O. Glaus; entered into a conspiracy with Saul Shiffrin; Sherpix, Inc.; Art Theater Guild, Inc.; and others, including Gordon Craddock, to distribute the obscene motion picture "School Girl" on a multi-state basis by shipping and receiving copies of the movie by common carrier and otherwise in interstate commerce. This conspiracy was in existence from on or about November 1, 1971, until on or about October 3, 1972.

During the existence of the conspiracy the above mentioned defendants knew the general nature and character of the movie "School Girl," which the Court has found to be obscene in fact.

The Court concludes that the defendants Richard Lewis Miller and Lou Wolff and Harry Brandt Booking Office, Inc. should be found not guilty because the proof does not establish that they joined the distribution conspiracy which the Court has found to exist with regard to certain other defendants.

While the Court is convinced that the person who appeared at the trial and said his name was Richard Louis Miller and the persons referred to in the Indictment as Richard Lewis Miller

and R. L. Mills are all one and the same person, the Court concludes that Miller's participation in the distribution of the movie "School Girl" terminated with its outright sale in California. He retained no royalties or other forms of participation in the profits from the exhibition of it. The government argues that Miller had a continuing interest in its success because that would enhance the value of future productions under the name R. L. Mills and the other identifying phases of the credits; however, there is no proof to support the argument that other movies owned by him were in being or even planned at the time of the sale. Although the proof does establish that the defendant Miller knew the nature and character of the movie later determined to be obscene, the Court does find him not guilty as charged in the Indictment.

Because the defendants Lou Wolff and Harry Brandt Booking Office, Inc. participated in the distribution and exhibition of the movie "School Girl" in a different fashion from the above-named defendants who were part of the distribution conspiracy, the Court concludes that they were not members of the distribution conspiracy shown by the proof. Booking agents function for a limited purpose in the distribution and exhibition of a movie. They bring the distributor and the exhibitor together for a flat fee, not a percentage of the receipts. They do not assume responsibility for the manner and means of the delivery and forwarding of a movie shipped to an exhibitor. In the instant case the proof applicable to them is minimal, and in the opinion of the Court does not establish that they knowingly joined the continuing distribution conspiracy. Therefore the Court concludes that Lou Wolff and Harry Brandt Booking Office, Inc. are not guilty as charged in the Indictment in this case.

The Court regrets the protracted delay that has occurred between the commission of the conduct included in the crime charged and this ruling on the case. Particularly, because the

proof reflects that all individual defendants were actively and openly engaged in the movie industry. Substantial phases of the delay were caused by stays which were implemented pending rulings on appeals in other cases which appeared to have issues relevant to this case. In addition to the stay occasioned by the *Marks* case as mentioned above, this case was stayed pending an appeal of a ruling on a Motion to Dismiss in another case which was pending in this District.

This is made even more regrettable by virtue of the fact that the law in cases of this kind has been so difficult to interpret and apply, thereby causing great controversy for the public and governmental officials in all levels of all branches of the federal, state, and local governments. However, the Supreme Court consistently has held that obscene motion picture films are not protected by the First Amendment to the United States Constitution and Congress has seen fit to make the transportation of obscene motion picture films by common carrier a criminal offense. The above ruling is this Court's application of the facts of this case to the above mentioned principles of law and the numerous authorities which have spoken to those principles.

The Court is of the opinion that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion without a pre-sentence investigation. Therefore, the Clerk is directed to notify all defendants found guilty herein that the sentencing hearing will be conducted in *Courtroom Number 2, United States Courthouse, Memphis, Tennessee, at 1:30 P.M., Friday, August 19, 1977.*

ENTER: This 28th day of July 1977.

ROBERT M. McRAE, JR., Judge
United States District Court

Extension of Time for Filing Motion for New Trial.

Because the attorneys for the defendants must be notified of this ruling by mail, the Court hereby extends the time for filing a Motion for New Trial to fifteen days from the date hereof, in the event that any defendant wishes to file a Motion for New Trial.

ROBERT M. McRAE, JR., Judge

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 79-313

In the Supreme Court of the United States

OCTOBER TERM, 1979

ELLIS GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

STEPHEN G. MILLIKEN
Attorney
Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1979 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on August 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced because his trial was conducted under the obscenity standards of *Miller* v. *California*, 413 U.S. 15 (1973), and his guilt was

determined under the standards of *Roth* v. *United States*, 354 U.S. 476 (1957), and *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966).

STATEMENT

Following a jury-waived trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of conspiracy to distribute an obscene film in interstate commerce, in violation of 18 U.S.C. 371 and 1462.[1] Imposition of a prison sentence was suspended and petitioner was placed on one year's probation and fined $3,000. The court of appeals affirmed in an opinion on which we largely rely (Pet. App. 1a-18a).

On February 15, 1973, a federal grand jury in Memphis, Tennessee, indicted petitioner and 24 other individuals and organizations, charging them with conspiring to produce and distribute the obscene film "School Girl" in interstate commerce. Petitioner distributed the film for public exhibition in several New England states (Pet. App. 2a, 26a).

The government's proof at trial was largely derived from stipulations as to the testimony of Saul Shiffrin, an unindicted co-conspirator. The stipulations established that Shiffrin had conversed with petitioner and other sub-distributors to obtain their participation in the distribution of the film in their respective areas. The customary distribution procedures, which petitioner and other sub-

[1]Petitioner was one of 12 defendants convicted on the conspiracy count in the non-jury trial; seven other defendants elected to be tried before a jury and were acquitted of the conspiracy charges but were found guilty of substantive offenses.

Three of the remaining six defendants tried by Judge McRae were acquitted, and three were not tried.

distributors to ship prints of the film to each other upon demand. Shiffrin's stipulated testimony established that petitioner and the other sub-distributors agreed to these procedures and that petitioner and the other sub-distributors had performed each of the overt acts alleged against them.

ARGUMENT

1. In *Marks* v. *United States*, 430 U.S. 188, 196-197 (1977), this Court held that alleged violations of obscenity laws occurring before this Court's decision in *Miller* v. *California*, 413 U.S. 15 (1973) must be decided under the standard of *Roth* v. *United States*, 354 U.S. 476 (1957) and *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966) (*Roth-Memoirs*) plus whatever benefit *Miller* secured. Petitioner invokes *Marks* to argue that the jury-waived trial of his pre-*Miller* conduct was erroneously conducted under the *Miller* test. However, as petitioner concedes (Pet.8), the district court did in fact decide the obscenity question in this case under *Roth-Memoirs*.[2] Petitioner was not prejudiced by this course of events.

[2]As the court of appeals explained (Pet. App. 3a) (footnotes omitted): "[A]fter the trial of the case but before filing his decision and entering judgment, the district judge learned that the Supreme Court had granted certiorari in *Marks*, *supra*, and accordingly delayed further proceedings in the case until the appeal was decided. On March 1, 1977, the Supreme Court held that persons indicted for conduct occurring before *Miller* were entitled to all of the benefits which *Miller* might confer, but were also entitled to application of the pre-existing *Roth-Memoirs* test of obscenity, which provided that materials could not be found to be obscene unless they were 'utterly without redeeming social value.' *Marks* v. *United States*, 430 U.S. 188, 196-97 (1977) (*Marks* II). On July 28, 1977, approximately five months after the Supreme Court's decision in *Marks II*, Judge McRae filed his findings of fact and conclusions of law. Applying both the *Miller* and *Roth-Memoirs* tests, he adjudged the film to be obscene and found the appellants guilty."

In an opinion on which we rely, the court of appeals properly disposed of petitioner's argument (Pet. App. 6a-7a):

> While there was some suggestion on appeal that certain of the defendants might have wished, as a matter of afterthought, to introduce further expert testimony on the obscenity question and its application under pre-*Miller* standards, nothing concrete has been offered or even suggested which would indicate how the defendants would have conducted themselves differently, had it been known at the time of trial that pre-*Miller* standards were still applicable.
>
> More particularly, certain appellants, notably [petitioner], complain that the submission of the case on the *Miller* standards denied them an opportunity to "present evidence or argue that the film did not violate the *Memoirs* test, particularly the last part, requiring that the material be 'utterly without redeeming social value' for it to be found obscene." The simple answer to this, as we mentioned above, is that no offer was ever made, although many months elapsed from the date of trial due to the trial court's decision to wait for further guidance from the Supreme Court. More particularly, despite an interval of nearly five months between the Supreme Court's decision in *Marks* and Judge McRae's opinion, not one defendant sought any right to re-argue the case under the old standards, or to submit additional evidence or to make any offer of proof as to what additional evidence he wished to submit, once the standard had been clarified. We can only view this, therefore, as an effort to obtain a second bite of the apple, and not as any claim of serious prejudice to any right of fair trial.

Petitioner now argues (Pet. 9) that he was "denied the right to present a defense" because certain unspecified "evidence" was allegedly inadmissible under *Miller* but admissible under *Roth-Memoirs*. But, as the court of appeals noted (Pet. App. 6a), "[t]here is * * * no complaint that the district court erred in excluding any evidence proffered * * *."

Nor is there any substance to petitioner's related claim that the adjustment in the applicable standard rendered petitioner's waiver of a jury trial involuntary. An unforeseen change in circumstances during trial does not necessarily invalidate a voluntary waiver of a jury trial. See *United States* v. *Colacurcio*, 499 F. 2d 1401, 1405 (9th Cir. 1974); *United States* v. *Sandrzadeh*, 440 F. 2d 389, 390 (9th Cir. 1971). Indeed, petitioner's claim that the waiver was involuntary rings hollow, because he received the benefit of a determination of obscenity based on *Roth-Memoirs*.[3] As the court of appeals correctly held (Pet. App. 7a-8a):

> [U]nder the circumstances here, neither the parties' trial strategy, their decision to have waived a jury, nor the trial judge's consideration of the evidence, were adversely affected by the fact that the case was tried upon the understanding of the law prevailing in [the Sixth] circuit and decided on a somewhat variant and later construction announced by the Supreme Court.

2. Petitioner further argues that the acquittal of defendants Sherpix, Art Theatre Guild, Gordon Craddock and Craddock Films on the conspiracy count in the

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[3]Indeed, as the court below pointed out, the trial judge was scrupulously aware of the proper test when he set aside the convictions of co-defendants where the jury had been improperly charged solely under *Miller* (Pet. App. 6a n.7).

jury trial deprived the district court of venue in petitioner's case. Petitioner's contention rests on a premise that the court of appeals found to be "without factual support in the record" (Pet. App. 12a)—namely, that those defendants were the only alleged co-conspirators to have committed overt acts within the Western District of Tennessee. Petitioner also ignores the fact that, while those defendants were acquitted of the conspiracy, they were convicted on the substantive counts constituting the overt acts alleged in the conspiracy count.

The district court found that a conspiracy existed between petitioner and Shiffrin, and Shiffrin's stipulated testimony supports that finding. See Pet. App. 12a-13a; A. 712-713.[4] As the court of appeals further pointed out (Pet. App. 12a):

> More fundamentally, however, we do not view the acquittal of Sherpix, Art Theatre Guild, Craddock and Craddock Films on the conspiracy charge as conclusive evidence that, for the purposes here, they did not actually commit the overt acts charged to them in the indictment. *See United States* v. *Samuel Dunkel & Co.*, 184 F. 2d 894, 898 (2d Cir. 1950), *cert. denied*, 340 U.S. 930 (1951).

Ample evidence was presented to show overt acts in the Western District of Tennessee. Shiffrin's testimony connected petitioner to the nationwide distribution scheme, and the "interdependence of the sub-distributors and their agreement to act in concert with one another in the circulation of the film * * * tied them together in a single criminal undertaking" (Pet. App. 11a). See *Hyde* v. *United States*, 225 U.S. 347, 365-367 (1912).

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[4] "A." refers to the joint appendix in the court of appeals.

3. Petitioner finally complains that the district court erred in refusing to permit him to introduce evidence as to the obscenity standards of communities in New England, petitioner's distribution area.

The court of appeals expressed doubt that the question had been adequately preserved for review (Pet. App. 15a) but held that, assuming it had, the district court did not abuse its discretion in refusing to consider such evidence (Pet. App. 15a-16a). As the court stated in rejecting a closely related argument (Pet. App. 13a):

> Once the conspiracy to which they belonged was shown to have extended to and operated in Memphis, the defendants had no right to have the obscenity of the film tried according to the community standards of other localities in which they might conceive public attitudes to be more permissive.

Petitioner seeks support from this Court's statement in *Hamling* v. *United States*, 418 U.S. 87, 106 (1974), that: "this is not to say that a district court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, *if it felt such evidence would assist the jurors* in the resolution of the issues which they were to decide" (emphasis added). But the decision thus lies in the discretion of the trial court; it is not required to admit such evidence in every case. See *Hamling* v. *United States*, *supra*, 418 U.S. at 123.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

STEPHEN G. MILLIKEN
Attorney

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